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**FILED**

JUN -5 2006

CLERK, U.S. DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA  
BY \_\_\_\_\_  
DEPUTY CLERK

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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA, ) CR-S-02-192-EJG  
11 )  
12 Plaintiff, )  
13 v. ) ORDER ON RESENTENCING  
14 )  
15 ROBERT W. WARREN, )  
Defendants. )

16 On April 28, 2006, the parties appeared before the Court on  
17 the Ninth Circuit's order of limited remand pursuant to United  
18 States v. Ameline, 409 F.3d 1073 (9th Cir. 2005). The United  
19 States was represented by Assistant U.S. Attorney. The defendant  
20 was represented by Assistant Federal Defender Rachelle Barbour.  
21 The defendant was not present pursuant to a filed waiver of  
22 appearance.

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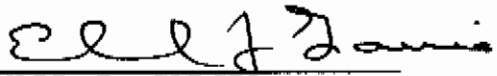
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1 For the reasons stated in the attached transcript  
2 (Attachment A), had the court known at the time of imposition of  
3 the initial sentence in this case that the Sentencing Guidelines  
4 were advisory only, the sentence imposed would not have been  
5 materially different.

6 SO ORDERED.

7 Dated: 6/5/06

  
EDWARD J. GARCIA  
United States District Judge

# ATTACHMENT A

COPY

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

HON. EDWARD J. GARCIA, JUDGE

DEPARTMENT 8, 13th Floor

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT W. WARREN,

Defendant.

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)  
)  
) No. CR. S-02-192  
)  
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)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

April 28, 2006

APPEARANCES:

For the Plaintiff: MARY GRAD  
Assistant U.S. Attorney

For the Defendant: RACHELLE BARBOUR  
Assistant Federal Defender

JILL R. MCLEOD, CSR 10071, Official Pro-Tem Reporter

1 THE CLERK: Criminal S 02-192, United States vs.  
2 Robert Warren.

3 MS. GRAD: Good morning, your Honor. Mary Grad for the  
4 United States.

5 THE COURT: Ms. Grad.

6 MS. BARBOUR: Good morning, your Honor. Rachelle  
7 Barbour appearing for Mr. Warren. He is not present. The  
8 court has allowed him to waive his appearance. He is  
9 currently being housed at the Bureau of Prisons.

10 THE COURT: Ms. Barbour. This matter is on calendar  
11 after a limited remand by the 9th Circuit Court of Appeals.  
12 The remand was pursuant to the Circuit's U.S. v. Amilene  
13 Decision for the purpose of having the court determine if the  
14 sentence imposed would have been materially different had the  
15 court known that the federal sentencing guidelines at the  
16 time were advisory only, and to proceed accordingly.

17 At the status conference after remand, I invited counsel  
18 to file briefs giving their views on the matter and the  
19 reasons therefore. Both parties have timely responded with  
20 written memoranda.

21 I have reviewed the parties' briefs and reviewed my  
22 personal notes regarding defendant's initial sentencing and  
23 the probation officer's presentence investigation reports. I  
24 also read the reporter's transcripts of both the entry of  
25 plea and the sentencing proceedings in this case, the

1 original sentencing proceedings in this case.

2 Do you wish to be heard further on the motion, excuse  
3 me, on the remand, Ms. Barbour?

4 MS. BARBOUR: Your Honor, I will submit it on my brief  
5 that I filed last week.

6 THE COURT: Ms. Grad?

7 MS. GRAD: I will submit it, your Honor.

8 THE COURT: For the reasons that I will state now on the  
9 record, I have determined the sentence of 94 months on this  
10 indictment, to which I originally sentenced the defendant  
11 pre-Booker, would not have been materially different had I  
12 known the federal sentencing guidelines were advisory only.

13 This individual's sentence of 94 months on this  
14 indictment must be viewed under the totality of the  
15 circumstances, which included a global plea bargain arrived  
16 at by the parties on two essentially separate cases, a  
17 portion of which plea bargain the court ultimately rejected.

18 On the case before the court in Indictment  
19 Number 02-0192, defendant pled guilty to a drug trafficking  
20 charge which carried a statutory mandatory minimum sentence  
21 of 120 months and up to life imprisonment.

22 Defendant, a major, high level drug dealer with numerous  
23 arrests and convictions for narcotics and firearms violations  
24 cut a deal with the Government for a sentence of one-half the  
25 mandatory minimum, that is, 60-months imprisonment, in return

1 for his cooperation with the Government ~~and~~ in the  
2 prosecution of others.

ETG

3 Pursuant to this plea agreement, defendant pled guilty  
4 pursuant to Federal Rule 11(C)1(C) and remained on pretrial  
5 release pending sentence.

6 With sentencing pending, the defendant committed and was  
7 arrested for another drug trafficking offense, distribution  
8 of 499.9 grams of cocaine.

9 He made a deal with the Government on this case also and  
10 pled guilty to a lesser charge of use of a telephone to  
11 facilitate a drug trafficking offense, which carried a  
12 statutory maximum sentence of 48-months imprisonment to run  
13 consecutive to the 60-months sentence he had previously  
14 plea-bargained, ~~for~~ and agreed upon an aggregate sentence of  
15 108 months on the two offenses.

ETG

16 The 11(C)1(C) agreement for ~~the~~ one-half of the  
17 statutory minimum, ~~which~~ <sup>that</sup> is the 60 months <sup>sentence on the first offense,</sup> began to unravel  
18 when the probation officer, in a combined presentence  
19 investigation report for the two cases, apparently mistakenly  
20 recommended that the two offenses be grouped together for  
21 guideline scoring purposes, pursuant to Guideline  
22 Section 3(D)1.2, Subdivision D, following the general rule  
23 that offenses determined largely on the basis of <sup>quantity of</sup> the drugs.  
24 involved, should be grouped together.

ETG

25 This resulted in a guideline range for the two grouped

offenses of 360 months to life, which threw the <sup>deal for a</sup> 5(K)1.1  
 sentence of 60 months on the first offense to run consecutive  
 with the 48 months on the second offense, <sup>into</sup> ~~which was somewhat~~  
~~of~~ a cocked hat.

After two sentencing hearings, during which I heard and  
 agreed with defendant's objections to the probation officer's  
 guideline scoring recommendations, I scored the two offenses  
 separately, so that for the second offense, <sup>and</sup> the one now  
 before the court, I arrived at a separate guideline range of  
 188 to 235 months imprisonment. That happened also to be the  
 probation officer's recommendation originally, before the  
 defendant committed his second offense.

I then granted the Government's 5(K)1.1 motion and  
 departed down to 94 months, one-half of the low end of the  
 guideline range.

Since the Federal Rule 11(C)1(C) agreement called for a  
 60-month sentence, I gave the defendant the option of  
 withdrawing his guilty plea. However, he declined, after I  
 told him that I was going to sentence him to 94 months, and  
 stood by his guilty plea.

I then entered judgment, fixing his sentence at  
 94-months imprisonment to run consecutive with the 48-months  
 sentence on the other offenses, for an aggregate sentence of  
 142-months imprisonment.

The reason it's important, in my judgment, to view the



1 two sentences together, that is, in the aggregate, is because  
 2 the 142-months imprisonment sentence, in my judgment, was an  
 3 appropriate sentence for defendant's total offense conduct.  
 4 The second offense for drug trafficking was particularly  
 5 egregious, being committed not only while on presentence  
 6 release but while, ostensibly, cooperating with the  
 7 Government DEA agents; and yet, the sentence of 94 months did  
 8 reward defendant for his cooperation, handsomely I believe,  
 9 albeit not as leniently as he had originally bargained for.

10 So had I known that the guidelines were advisory only  
 11 when I originally sentenced the defendant, I would have  
 12 analyzed and reasoned the sentence in this case essentially  
 13 the same.

14 I would have first determined the appropriate guideline  
 15 ranges, including the 5(K)1.1 downward departure motion,  
 16 determined whether there was any basis for other upward or  
 17 downward departures, then considered if there was any  
 18 justification for outside the advisory guideline ~~variations~~ <sup>variances,</sup>  
 19 then considered Section 3553(A) of Title 18 U.S. Code. EJG

20 Thus, this 94-month sentence coupled with the 48-month  
 21 sentence would have been within the advisory guideline range  
 22 and addresses relevant Section 3553(A) factors. It reflects  
 23 the seriousness of the offense and provides just punishment.  
 24 It affords adequate deterrents, both individual and general,  
 25 and protects the public from further crimes by the defendant;

1 at least for some 16 and a half years, including the  
2 five-year period of supervised release.

3 As for defendant's perception that the court seemed  
4 restrained by the low end of the mandatory guideline range,  
5 defendant is mistaken. Even had the guidelines been advisory  
6 only, defendant's breach of the plea agreement in the instant  
7 case by committing the second drug trafficking offense  
8 overrode any consideration for further leniency by going  
9 below 50 percent off the low end of the advisory guideline  
10 range on the Government's 5(K)1.1 motion.

11 I will ask the U.S. to prepare and submit a proposed  
12 summary order of the court's decision on remand for my  
13 signature.

14 Anything further for now, Ms. Barbour?

15 MS. BARBOUR: No, your Honor. Thank you.

16 THE COURT: Ms. Grad?

17 MS. GRAD: No, your Honor. Thank you.

18 THE COURT: All right. Thank you, Counsel.

19 (The proceedings were concluded.)  
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1 STATE OF CALIFORNIA )  
2 ) ss.  
3 COUNTY OF SACRAMENTO )

4 I, JILL R. MCLEOD, Official Pro-Tem Reporter of the  
5 United States District Court, Eastern District of California,  
6 do hereby certify that the foregoing pages, 1-8, comprise a  
7 full, true and correct transcription of my stenographic notes  
8 in the aforementioned case of the proceedings held on  
9 April 28, 2006.

10  
11 Dated this 28th day of May, 2006.

12  
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14 

15 JILL R. MCLEOD, CSR 10071  
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